Supreme Court, U.S.
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No. 93-219

In The

Supreme Court of the United States

October Term, 1993

DONALD RICHMOND,

Petitioner,

vs.

IRVIN NODLAND,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the affirmance by the Supreme Court of the State of North Dakota of a grant of summary judgment by a state trial court in a legal negligence action mandate the exercise of judicial discretion and issuance of a writ of certiorari by this Court?

PARTIES TO THE PROCEEDING

Donald Richmond seeks review of a decision by the Supreme Court of North Dakota which affirmed a grant of summary judgment in favor of respondent, Irvin Nodland, in a legal negligence action. Donald Richmond appeared pro se throughout the trial court proceedings and the appeal to the Supreme Court of the State of North Dakota.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Irvin Nodland, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the North Dakota Supreme Court. That decision is reported at 501 N.W.2d 759 (N.D. 1993).

STATEMENT OF THE CASE

Petitioner, Donald Richmond, brought this legal malpractice action on April 1, 1990 in the South Central Judicial District, State of North Dakota against Respondent Irvin Nodland. The matter arose out of a criminal complaint charging Richmond with the crime of arson

brought by the Burleigh County States Attorney's office in February of 1988. Respondent Nodland ultimately represented Richmond with respect to that criminal charge.

The underlying uncontroverted facts of this case are set out in *Richmond v. Haney*, 480 N.W.2d 751 (N.D. 1992), a companion case to that involving Respondent Nodland. In *Richmond v. Haney*, Richmond had sued the City of Bismarck, North Dakota, and Burleigh County, North Dakota alleging malicious prosecution with respect to the arson charge. The North Dakota Supreme Court concluded that probable cause existed for the arson charge and affirmed the trial court's dismissal of the complaint. *Id.* at 758.

When Richmond learned that he had been charged with arson, he contacted Attorney Calvin Rolfson. After making an initial investigation into the criminal charge against Richmond, Attorney Rolfson recommended that he seek a more experienced criminal defense attorney and arranged an April 6, 1988 meeting between Nodland and Richmond to discuss possible representation. Although the parties dispute the terms of the retainer agreement reached at the April 6, 1988 meeting, it was undisputed that Nodland agreed to represent Richmond on the arson charge and that Richmond gave to Nodland a $10,000 check. Nodland was ultimately successful in gaining dismissal of the charge of arson.

In April of 1990, Richmond brought two separate actions against Rolfson and Nodland for damages arising from their legal representation of him with respect to the

1988 arson charge. The case against Rolfson was dismissed after the filing of a motion for summary judgment. The trial court granted Nodland's motion for summary judgment on November 25, 1992 and dismissed all of Richmond's claims, including assertions of fraud and deceit, breach of contract, and legal malpractice.

The Supreme Court of North Dakota affirmed the grant of summary judgment on July 16, 1993. *Richmond v. Nodland*, 501 N.W.2d 759 (N.D. 1993). The North Dakota Supreme Court concluded "[t]hat there is no genuine issue as to material facts on Richmond's legal malpractice claim and that the trial court properly granted summary judgment dismissing it." Id., at 761. The petitioner sought rehearing from the North Dakota Supreme Court which was denied in an order dated July 1, 1993.

REASONS FOR DENYING THE WRIT

The decision of the Supreme Court of North Dakota is predicated upon an application of the substantive law in North Dakota with respect to legal malpractice actions and is wholly dependent upon an analysis of the particular facts involved in the underlying matter. The matter before the Supreme Court of North Dakota did not involve a decision of a United States court of appeals, did not involve a decision of a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals, and was not a decision which invoked an important question of federal law.

I. The decision of the Supreme Court of North Dakota is based upon a review of undisputed facts, an application of North Dakota substantive law, and did not involve a federal question.

The decision of the Supreme Court of North Dakota in *Richmond v. Nodland*, 501 N.W.2d 759 (N.D. 1993), turns solely upon an analysis of the particular facts involved which the North Dakota Supreme Court concluded were uncontroverted and justified affirmance of the trial court's decision to grant summary judgment.

The petitioner cites no cases which would justify the granting of a writ of certiorari to the Supreme Court of the State of North Dakota. The petitioner cites only 28 U.S.C. § 2101(c) as a basis for jurisdiction of this Court to grant a writ of certiorari. That statute describes only the time frame within which a petition for writ of certiorari must be made and does not address the substantive basis of granting such a writ in a matter where a state Supreme Court has affirmed the grant of summary judgment by a trial court in a matter that depends wholly upon the weighing of uncontroverted evidence and the application of North Dakota case law as it contrasts with those undisputed facts.

This Court has stated, "[w]e do not grant a certiorari to review evidence and discuss specific facts." *US v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041 (1984). That is precisely what the petitioner requests in this petition.

None of the character of reasons outlined in Rule 10.1, Supreme Court Rules, apply in this instance. This matter does not involve a decision of a United States

court of appeals, nor does it involve a situation where a state court of last resort has decided a federal question in a way that conflicts with a decision of another state court of last resort. It is not a case predicated upon a question of federal law.

What the petitioner asks is a review of factual issues and an assessment of the judicial discretion exercised by the trial court and affirmed by the Supreme Court of North Dakota. The finding made by the trial court received the concurrence of the Supreme Court of North Dakota. In that situation, this Court has often held that "[a] court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Gravar Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), and cases cited; *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967).

At best, the petitioner asserts that the underlying dispute is a genuine issue of material fact, but there is no showing that it involves a question of federal law. For that reason, the granting of the writ would be inappropriate.

II. The decision of the Supreme Court of North Dakota is in harmony with other decisions in the State of North Dakota.

The Supreme Court of North Dakota, in *Richmond v. Nodland*, 501 N.W.2d 759, 761 (N.D. 1993) concluded that there was "[n]o genuine issue as to material facts on

Richmond's legal malpractice claim and that the trial court properly granted summary judgment dismissing it." The petitioner asserts that the decision of the Court was arbitrary and capricious and in conflict with another decision of the North Dakota Supreme Court, *McAdam v. Dynes*, 442 N.W.2d 914 (N.D. 1989). The Supreme Court of North Dakota specifically cited the *McAdam* case and found that it was not controlling of the legal or factual issues in this matter. The Court went on to conclude "[e]ven viewing the evidence in the light most favorable to Richmond, we conclude that there are no genuine issues of material fact about the terms of the parties' oral fee agreement. The trial court did not err in granting summary judgment dismissing Richmond's breach of contract claim against Nodland." *Richmond v. Nodland*, at 762.

There is no federal question and the decision of the Supreme Court of North Dakota is in harmony with past decisions of that court. There is no legal controversy of such importance that would mandate the intervention of this court.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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